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Supreme Court, U.S.
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No. 92-1112

In The

Supreme Court of the United States

October Term, 1992

PELE DEFENSE FUND,

Petitioner,

vs.

WILLIAM PATY, in his capacity as Chairman of the Board of Land and Natural Resources, State of Hawaii, *et al.*,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of Hawaii

STATE OF HAWAII RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Petitioner, a party to a federal judgment dismissing identical claims against the State officials here because the federal suit sought retrospective relief, was properly precluded in this state court action from repleading (a) the federal equity claims dismissed in federal suit; and (b) state law claims, which in the judgment of the state court, must fail because they also sought similar retrospective relief?

2. Whether affirmance is independently mandated by 28 U.S.C. § 1738 and the final judgment in *Dedman v. Board of Land and Natural Resources*, 69 Haw. 255, 740 P.2d 28 (1987)?

3. Whether, independent of preclusion law, the definition of "person" as that term is used in 42 U.S.C. § 1983, and other legal principles related to Hawaii's sovereign immunity require affirmance of the judgment of the Hawaii state courts below?

4. Whether Petitioner's federal claims, which were all filed more than two years after they accrued, were in any event properly terminated on statute of limitations grounds?

5. Whether, in light of *Suter v. Artist M.*, 112 S.Ct. 1360 (1992), this Court would, if review were granted, affirm the judgment in that 42 U.S.C. § 1983 does not provide an enforcement vehicle for the federal statutory claims in this case, or, in that the record plainly refutes the contention that § 5(f) of the Hawaii Admission Act has in any way been breached?

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Petition For Writ Of Certiorari To The Supreme Court Of Hawaii

STATE OF HAWAII RESPONDENTS' BRIEF IN OPPOSITION

OPINIONS RELATED TO THE PETITION

In addition to those cited in the Petition, the opinions in *Ulaleo v. Paty*, 902 F.2d 1395 (9th Cir. 1990), and *Dedman v. Board of Land and Natural Resources*, 69 Haw. 255, 740 P.2d 28 (1987), *cert. denied*, 485 U.S. 1020 (1988), as well as the unpublished orders below therein, are related to this Petition.

JURISDICTION

The Petition seeks to nullify the December 23, 1985 exchange deed between the State of Hawaii and the Estate of James Campbell, in which the State conveyed the surface rights to 27,786 acres of land which had been returned to Hawaii by its Admission Act, Pub. L. 86-3, 73 Stat. 4 (Mar. 18, 1959).

The Hawaii Supreme Court denied Petitioner this relief. Because the alternative relief held open by the Supreme Court of Hawaii on remand, which would run solely against the private respondents, would not appear to moot entirely the Petitioner's prayer, the judgment below appears to be final. In addition, it would appear that Petitioner has Article III standing on the same basis as existed in *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 617-24 (1989), though Petitioner, we submit, would not have standing in federal district court in an original suit. *See Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2137 (1992).

The substantial jurisdictional defects in the Petition lay mainly under the scope of 42 U.S.C. § 1983 and the mandates Petitioner or its privies ignored in failing to seek review earlier in *Ulaleo*, and *Dedman*. *See* 28 U.S.C. §§ 1254, 1257.

STATEMENT OF THE CASE

This is essentially the third federal appeal in which the Pele Defense Fund or its privies have sought to undermine the foundational transaction for efforts to

develop geothermal energy in our State. In this transaction, the State of Hawaii exchanged roughly 27,800 acres of public "ceded" lands conveyed to the State of Hawaii under § 5 of its Admission Act for 25,800 acres of private fee simple land located adjacent to the environmentally and culturally sensitive Hawaii Volcanoes National Park on the Big Island of Hawaii. Nearly five years ago, this Court denied review in the first appeal, *Dedman v. Board of Land and Natural Resources*, 485 U.S. 1020 (U.S. cert. denied Apr. 25, 1988), which had presented to this Court as the sole question for review whether the development of the lands granted to Campbell Estate violated Petitioner's privies' rights under the First Amendment. In the second suit, *Ulaleo v. Paty*, 902 F.2d 1395 (9th Cir. 1990), in which Petitioner was a party, Pele Defense Fund did not seek review here of the Ninth Circuit decision dismissing all its claims against the state parties on the basis of the Eleventh Amendment and the principles set forth by this Court in *Papasan v. Allain*, 478 U.S. 265 (1986). *Ulaleo*, like the instant suit, sought redress for alleged "breach of trust" cognizable under § 5(f) and 42 U.S.C. § 1983.

In the judgment below in this action, the Supreme Court of Hawaii concluded that, taken together with this Court's decision in *Will v. Michigan*, 491 U.S. 58 (1989), the judgment in *Ulaleo* precluded Petitioner's companion state court claims for "breach of trust" under 42 U.S.C. § 1983. Construing Hawaii's own law of sovereign immunity as imposing the same "prospective/retrospective" distinction that exists under Eleventh Amendment doctrine, the Hawaii Supreme Court also barred Petitioner's related state law claims. The court below concluded independently that the suit here sought retrospective relief of

the kind barred in *Papasan v. Allain*, 478 U.S. 265 (1986), and, thus, the claims raised here could not proceed.

In addition, the Hawaii Supreme Court, following the mandate of *Owens v. Okure*, 488 U.S. 235 (1989), determined that the Petitioner's federal claims were barred by the two-year residual limitations period for personal injury actions set forth at Haw. Rev. Stat. § 657-7 (1985). The court did not pass on a host of additional grounds for affirming the judgment of the state trial court, which had dismissed all claims for relief.

Whether the fact-bound judgment of the court below should be subject to further review here is the issue on this Petition.

1. The lands at issue in this suit were originally ceded by the Republic of Hawaii to the United States upon annexation of Hawaii in 1898, and were returned to the new State of Hawaii upon its admission to the Union in 1959, pursuant to § 5 of the Admission Act, Pub. L. No. 86-3, 73 Stat. 4, 6 (1959). *See also* the Joint Resolution to Provide for Annexing the Hawaiian Islands, 30 Stat. 750 (1898), and the Organic Act, Act of April 30, 1900, 31 Stat. 141 (1900). Under § 5(f), these "ceded" lands were granted to Hawaii in fee for disposition for "one or more" of five purposes: (1) "support of the public schools and other public educational institutions"; (2) "betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended"; (3) "development of farm and home ownership on as widespread a basis as possible"; (4) "making of public improvements"; and (5) "provision of lands for public use." Congress stated that failure to manage or dispose of

the lands subject to § 5(f) "for one or more of the foregoing purposes in such manner as the constitution and laws of [Hawaii] may provide" would be "a breach of trust for which suit may be brought by the United States." 73 Stat. at 6. The history of § 5(f) is barren of "any indication that Congress intended to create a private cause of action via the Admission Act," and, "by providing a specific remedy, Congress intended to exclude others." *Keaukaha-Panaewa Community Ass'n v. Hawaiian Homes Commission*, 588 F.2d 1216, 1223 (9th Cir. 1978) ("*Keaukaha I*"); *but see Price v. Hawaii*, 939 F.2d 702 (9th Cir. 1991)), *cert. denied*, 112 S. Ct. 1479 (1992). As a general matter, § 5(f) "broadly allows the State to expend trust funds on 'one or more' of [the] five statutory purposes." *Price v. Hawaii*, 764 F.2d 625, 630 (9th Cir. 1985). Moreover, state constitutional provisions Hawaii has enacted to implement § 5(f), provide, in and of themselves, "no 'judicially discoverable and manageable standards,' " for allocating trust assets to native Hawaiian beneficiaries of the 5(f) trust. *Trustees of the Office of Hawaiian Affairs v. Yamasaki*, 69 Haw. 154, 175, 737 P.2d 446, 457, *cert. denied*, 484 U.S. 898 (1987).

2. At all times relevant to this suit, Hawaii's general statutes governing public lands reaffirmed the discretion to sell or exchange public trust land. The State Board of Land and Natural Resources, assigned principal jurisdiction over the ceded lands, may dispose of "real property . . . less than the fee" without executive order, and may exchange public for private land for any "public purpose" without public auction. *See* Haw. Rev. Stat. §§ 171-11, 171-50(b) (1985). Public law mandates public notice for such land exchanges and grants the Legislature a one-session opportunity to disapprove of the exchange

by two-thirds vote for any reasons the Legislature might find appropriate. *Id.* § 171-50(c). The law states that "no exchange shall be made should public land exceed 120 per cent of the value of the private land," but grants the Board broad discretion to decide how value is to be computed so long as "a disinterested qualified appraiser" concurs. *Id.* § 171-50(b). Parts of the public lands at issue here were subject to the Natural Area Reserves System Act ("NARS"), a state law that, in the relevant time period, provided a means for including land in a "reserves system," but contained no express limitations on alienation of "system land." *See* Haw. Rev. Stat. §§ 195-3, 195-4(1)-(2) (1985). Standards for alienating "NARS" lands were not enacted until 1987. *See id.* § 195-10 (Supp. 1992). The lands at issue were also subject, during the relevant time frame, to the Geothermal Development Act, which granted the Board power to designate "geothermal resource subzones" in those areas that best show an acceptable balance of seven factors for development of geothermal energy, including "[s]ocial and environmental impacts," Haw. Rev. Stat. § 205-5.2(b)(4) (1985). During the events here, the law required notice of the Board's preliminary findings, and trial-type agency review, with direct review in the Hawaii Supreme Court, of any protests to proposed geothermal development. *Id.* §§ 205-5.1-5.2.

3. In 1985, the Board, with support from the Hawaii legislature, invited the Campbell Estate to exchange certain of its private lands for public lands located in the Kilauea Middle East Rift Zone ("KMERZ"), which included the Wao Kele 'O Puna Natural Reserve. The Campbell Estate lands, located closer to Volcanoes

National Park, could not be as easily developed for geothermal energy due to their close proximity to ongoing volcanic activity, and, in any event, contained pristine Ohia rainforest, sheltering nine threatened or endangered species. By contrast, the lower elevation and ecologically disturbed KMERZ lands were farther removed from Volcanoes National Park and from visible volcanic manifestations of the Hawaiian goddess Pele, which are both culturally and spiritually significant to practitioners of native Hawaiian religion. *See* Haw. Sen. Con. Res. No. 85-30 (Apr. 9, 1985).

4. On September 30, 1985, the State's appraiser issued his report, recommending an exchange provided that an $83,000 shortfall in value to the 5(f) trust could be made up by the Estate. In addition, it was recommended to the Board that any removal of the Wao Kele 'O Puna reserve lands from the NARS be accompanied by creation of a new reserve of similar size on the Campbell lands. This was done. The proposed proprietary boundaries were also modified to equalize the value of the land exchanged, and public notice of the exchange, as required by law, was given prior to execution of the exchange deeds on December 23, 1985. Under its deed, the State retains subsurface rights to the KMERZ parcel, including all rights arising from the land's geothermal potential; the State thus netted clear title to 25,800 acres of geothermal rights, whereas Campbell retained nothing from its original parcel. The lands received from Campbell also had more than 1600 more acres zoned for – and amenable to – profitable agricultural uses than the lands the State traded away. Under state law, moreover, the traditional rights of "native tenants" ran to and burdened the lands transferred by Hawaii to the Estate.

5. Petitioner's privies participated in administrative trial-type hearings over the zoning of this exchanged land during the period in which the legislature considered vetoing the exchange. Permits by which Campbell was authorized to use the lands for geothermal development were granted by the Board on April 11, 1986, only after Palikapu Dedman and Dr. Noa Emmett Aluli, the principal officers of appellant Pele Defense Fund, filed extensive papers opposing the enabling authorizations. In those papers, Pele Defense Fund's principals broadly challenged the grant of authority to the Estate to develop geothermal energy as violative of § 5(f) of the Admission Act, in that "the religious interests of Native Hawaiians will be violated"; "the value of the tracts exchanged are not equal"; "hunting, gathering, and other subsistence rights of Native Hawaiians in the lands conveyed to Campbell Estate will be impaired or lost entirely"; and "the total land area subject to the trust . . . will ultimately be diminished." In its Decision and Order, the Board expressly determined, however, that the Estate was properly "the landowner" of the lands in question, subject only to the Legislature's right to disapproval. *See In re CDUA*, HA 85-1830 (Haw. BLNR Apr. 11, 1986) at 6, 10. On April 23, 1986, the Legislature let the deadline for disapproval pass without action. Shortly thereafter, the Congress approved legislation authorizing transfer of 5,650 acres of the formerly-Campbell land (now in the State) to the United States, in order to consolidate and protect the environmentally sensitive lands in and around the Volcanoes National Park. Pub. L. No. 99-564, 100 Stat. 3179 (1986). In 1987, the state Supreme Court affirmed the permits granted to Campbell, rejecting the claim that title

was wrongly conveyed. *Dedman, supra.* This Court denied review. *See id.*

6. In 1990, the Ninth Circuit affirmed the federal district court's dismissal of Pele Defense Fund's suit seeking to void the exchange pursuant to § 5(f) and various arguments that the exchange violated state law. *Ulaleo, supra.* Applying this Court's decision in *Papasan v. Allain,* 478 U.S. 265 (1986), the Ninth Circuit viewed the complaint in *Ulaleo* as stating that "sometime in the past, the BLNR undertook an action, the land exchange, which allegedly injured the plaintiffs by violating the trust of which the plaintiffs are beneficiaries." 902 F.2d at 1400. Because this essential claim provided "no allegation that the Board is continuing to violate its trust duties in other ways or that it is likely to do so in the future," and as reversal of the exchange "would require the state to purchase the lands from its present holder by way of cash or other land," the court held that the Eleventh Amendment was a bar to suit.

7. In 1992, in this suit, the Supreme Court of Hawaii affirmed the state court companion to *Ulaleo.* Over Respondents' objection that this Court's decision in *Suter v. Artist M.,* 112 S. Ct. 1360 (1992), counseled against reading § 5(f) to be enforceable under the "and laws" language of 42 U.S.C. § 1983, the state court cited with approval to Ninth Circuit decisions that had held to the contrary, and found that "standing" was present for state law purposes. Pet. App. 19a-24a. These rulings were reduced to *dicta,* however, by the Hawaii Supreme Court's conclusions (1) that *Ulaleo* was issue-preclusive, for purposes of determining whether the bar on retrospective relief, applicable in state court under *Will v.*

Michigan, 491 U.S. 58 (1989), was operative (Pet. App. 29a-31a); (2) that preclusive effect also ran to Petitioner's state-law-based causes of action, in that Respondents were sued only in their official capacity, and Hawaii law recognizes the "prospective/retrospective" distinction which forms the basis for this Court's Eleventh Amendment precepts (*id.* at 38a-44a); (4) the exception for "prospective" relief applied independently of *Ulaleo* (*id.* at 43a-45a); and (5) Plaintiffs' federal causes of action, filed on March 10, 1989, nearly three years after the legislature had refused to disturb the land exchange with the Estate, were held independently barred by the two year residual personal injury statute of limitations, Haw. Rev. Stat. § 657-7 (1985), enforceable by 42 U.S.C. § 1988 and *Owens v. Okure*, 488 U.S. 235 (1989) (Pet. App. at 24a-28a). Because the state parties were properly dismissed, relief voiding the exchange could not be had against the private parties (Pet. App. 47a), but Petitioner would be afforded an additional opportunity on remand to demonstrate that the "native tenants" rights adhering under Hawaii law permit at least some of its members "to enter the undeveloped areas of the exchanged lands to exercise their traditional practices" (*id.* at 57a).

REASONS FOR DENYING THE WRIT

The decision of the Hawaii Supreme Court in this fact-bound case presents no issue warranting this Court's further review.

1. Petitioner's claim that the Hawaii Supreme Court improperly "purported to apply state preclusion rules" in

determining the effect of the *Ulaleo* judgment (Pet. at 6) not only misstates the holding below, but does nothing to show even error in the judgment, let alone an error that merits deployment of this Court's resources. While it goes without saying that the preclusive effect of the *Ulaleo* judgment is a federal issue, *see, e.g., Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518, 525 (1986), the mere fact that the state court cited several of its own cases on the matter of collateral estoppel shows no disrespect to the federal nature of the issue before it. Indeed, both the Hawaii Supreme Court, and this Court, in reviewing the scope of federal judgments, have relied on the same sources for decades. *In re Bishop Estate*, 36 Haw. 403 (1943), on which the state court expressly relied below, for example, draws its analysis from *Southern Pacific Railroad v. United States*, 168 U.S. 1 (1897). *See* 36 Haw. at 417 (quoting *Southern Pacific*). *Morneau v. Stark Enterprises, Ltd.*, 56 Haw. 420, 539 P.2d 472 (1975), also quoted by the state court below, likewise relies, as has this Court, on Justice Traynor's instructive opinion for the California Supreme Court in *Bernhard v. Bank of America Nationwide Trust and Savings Ass'n.*, 19 Cal. 2d 807, 122 P.2d 892 (1942). *Compare Morneau*, 56 Haw. at 423-24, 539 P.2d at 474-75 (quoting *Berhnard*), *with Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 329 (1979) (same). Nor can the Hawaii court's mere citation to *Allen v. McCurry*, 449 U.S. 90 (1980), indicate disrespect for federal law. Indeed, the very portion of the *Allen* case cited by the Hawaii Supreme Court itself referred to principles of preclusion law drawn from cases involving federal judgments. *See* 449 U.S. at 95 (citing *Montana v. United States*, 440 U.S.

147, 153 (1978); *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 328-29 (1971)). There is no disharmony between the judgment below and the "federal interests" underlying federal judgments.

2. Nor, as Petitioner asserts, did the state court misapply federal preclusion law. Although such a mere error would not warrant certiorari in any event, the Hawaii Supreme Court's ruling below fits well within established doctrine which prohibits the relitigation of jurisdictional facts in a later proceeding even "upon a different cause of action." *Parkland Hosiery Co. v. Shore*, 439 U.S. at 326 n.5. It is well-settled "that '[t]he principles of *res judicata* apply to questions of jurisdiction as well as to other issues.' " *Underwriters Assur. Co. v. North Carolina Life & Accident & Health Insurance Guaranty Ass'n*, 455 U.S. 691, 706 (1982) (quoting *American Surety Co. v. Baldwin*, 287 U.S. 156, 166 (1932)). Plainly whether the claims asserted in *Ulaleo* sought "retrospective" relief was put in issue and decided in that case adversely to Petitioner, and nothing in the Petition in any way indicates that the claims below were in any material sense different than those in *Ulaleo*. Accordingly, it was wholly proper for the state court to deem both Petitioner's federal and state claims (the latter of which, under rules of law recognized by Hawaii courts for decades, *see* Pet. App. 41a, were properly held to be subject to the same sovereign immunity limitations as set forth in *Ex parte Young*, 209 U.S. 123 (1908)), barred by the unappealed judgment in *Ulaleo*. In *Will v. Michigan*, 491 U.S. 58 (1989), this Court made clear that suits for retrospective relief against state officers sued in their official capacities are not against a "person" for purposes of 42

U.S.C. § 1983. Thus, *Ulaleo* ended the action below. Petitioner's policy arguments urging a different result (*See* Pet. at 9-10) simply take issue with the salutary doctrine of collateral estoppel, a rule that reflects the " '[p]ublic policy . . . that there be an end of litigation,' " and " 'that those who have contested an issue shall be bound by the result of the contest.' " *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981). And, because collateral estoppel infects each of Petitioner's claims here, the entirety of the judgment in favor of Respondents is correct, and review should be denied.

3. Even if *Ulaleo* did not exist, however, the same result would obtain. Petitioner does not anywhere demonstrate error even in the Ninth Circuit's determination in *Ulaleo* that the claims seeking to undo the land exchange, either directly or indirectly, were anything but a prayer for "return of the trust corpus itself." *Papasan*, 478 U.S. at 281. Indeed, as Respondents argued below, Petitioner's privies had the opportunity to litigate the legality of the land exchange in the *Dedman* proceeding yet lost on or waived their present issues there. If there was any misapplication of the law of preclusion, it was that by the courts below which did not end this case on the basis of the final decision in *Dedman* nearly six years ago.

4. Petitioner has, in any event, no good argument that the Hawaii Supreme Court wrongly found, independently, that the statute of limitations had run on the federal claims below. Indeed, Petitioner, urging that a State's general "residual statute of limitations" should apply "when a state has multiple personal injury statutes of limitations," Pet. at 11, misstates the holding of *Owens*

v. Okure, 488 U.S. 235 (1988). That case holds that "where the state law provides multiple statutes of limitations for personal injury actions, courts considering § 1983 claims should borrow the general or residual statute for *personal injury* actions." *Id.* at 250. Petitioner, as it did below, wrongly confuses *personal* actions, covered by the six-year statute set forth in Haw. Rev. Stat. § 657-1(4), with *personal injury* actions, which are generally governed by a two-year period. *see* Haw. Rev. Stat. § 657-7 (1985). The lower courts have properly rejected Petitioner's contention as seeking to impose a State's general "catch-all" limitations period when this Court has directed adoption of "the general or residual statute for personal injury actions." *See Del Percio v. Thornsley*, 877 F.2d 785, 786 (9th Cir. 1989); *Perez v. Seevers*, 869 F.2d 425 (9th Cir. 1989). Indeed, the Ninth Circuit is in direct agreement with the Hawaii Supreme Court that the two-year period applies to § 1983 suits. *See Price v. Hawaii*, 939 F.2d 702, 708 n.7 (1991). This case presents no justification for overturning these well-reasoned precedents.

5. Petitioner's reliance on cases from Hawaii allowing suit within six years for legal malpractice, *Higa v. Mirikitani*, 55 Haw. 167, 517 P.2d 1 (1973), or fraudulent inducement, *Au v. Au*, 63 Haw. 210, 626 P.2d 173 (1981), is unresponsive to *Owens*, for neither *Higa* nor *Au* were "tort" cases in the strict sense. The cause of action in *Higa* was deemed an "amalgam of both tort and contract," 55 Haw. at 172, 517 P.2d at 5, while *Au* observed it was "ambiguous" whether a claim for fraudulent inducement was a person injury claim at all. *See* 63 Haw. 263, 264 (1981) (on petition for rehearing). Nowhere has the Supreme Court of Hawaii suggested that Haw. Rev. Stat.

§ 657-7 is not the "residual or general personal injury statute." The judgment here therefore does not warrant any further review. This case does not present any situation, as in *Felder v. Casey*, 437 U.S. 131 (1988), where a too-short limitations period is deemed inconsistent with federal policy. Indeed, Petitioner's argument that the two-year statute might not be applicable in state court even when it is the proper statute for claims in the federal courts turns the notion of preemption upside down.

6. Nor is the "accrual" issue identified by Petitioner a proper candidate for certiorari. This issue was not properly raised below, and, in any event is of no merit. As the Ninth Circuit has observed in rejecting similar claims of "ongoing injury," the "passive receipt of [benefits] from an illegal contract" "is not an overt act of enforcement which will restart the statute of limitations." *Eichman v. Fotomat Corp.*, 871 F.2d 784, 794 (9th Cir. 1989). The claims in this case were all ripe at the very latest when the Legislature refused to intervene and stop the land exchange, if not before. *Cf. I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 427 n.3 (1987) (claim is ripe even though Legislature has the authority to moot question). The two-year statute had long run when this suit was filed.

7. In addition to the foregoing, the State of Hawaii respondents contend that, under the reasoning of this court's recent decision in *Suter v. Artist M.*, 112 S. Ct. 1360 (1992), § 5(f) of the Admission Act is not enforceable under 42 U.S.C. § 1983. Because it is undisputed that § 5(f) does not itself provide for a private right of action, *see Keaukaha I, supra*, the issues raised by Petitioner might well never be reached by this Court, in that it would be this Court's prerogative to affirm, at least with respect to

Pele Defense Fund's federal claim, on the ground that Petitioner has no federal cause of action at all. *Suter* makes quite clear that in cases where federal assets are returned to the States, the creation of "enforceable rights" under § 1983 must be done "unambiguously" in the statute at issue. *See* 112 S. Ct. at 1367. In this context particularly, in which the federal act brings Hawaii into the Union "on an equal footing" with our sister States, it would be doubly surprising if Congress were to be deemed to have created privately enforceable rights. As this Court emphasized in *Utah Division of State Lands v. United States*, 482 U.S. 193 (1987), when it has come to efforts to burden a State's title to lands conveyed by admission to the Union, "the strong presumption is against finding an intent to defeat the State's title," and, thus, a court "cannot infer that Congress intended to defeat a future State's title" " 'unless the intention was definitely declared or otherwise made very plain.' " *Id.* at 201-02. Here, in contrast to other Admission Acts, Hawaii's Act does not declare transactions in violation thereof to be "null and void." *Cf.* the New Mexico-Arizona Enabling Act, 36 Stat. 557, 574 (1910). Rather, the remedy provided by the act is a suit for appropriate relief by the United States. That remedy, of course, might not itself "foreclose remedies under § 1983," but it does show "that the absence of a remdy to private plaintiffs under § 1983 does not make [§ 5(f)] a dead letter." *Suter*, 112 S. Ct. at 1369. Moreover, it is particularly inappropriate to imply a § 1983 remedy in the circumstances of this case, for every one of Petitioner's "federal" claims depends not on the "one or more" provisions of § 5(f) in a general

sense, but rather on the idea that Hawaii allegedly violated state law which is merely (and as to after-enacted law only arguably) referenced in § 5(f). Even if the idea had merit, "there is no authority anywhere supporting the proposition that a state [law] becomes a federal law merely by virtue of its inclusion in a state plan required by federal law." *Oberlander v. Perales*, 740 F.2d 116, 119 (2d Cir. 1984). Here, as in *Suter*, the federal act does no more than require satisfying the United States. *See Suter, supra*, 112 S. Ct. at 1369. Thus, rather than enforcing Congress's intent, implying a § 1983 remedy defeats the discretion vested in the United States *not* to sue.

8. Finally, this case is particularly inappropriate for review here in that Petitioner never presented any evidence below to show that § 5(f) had been violated even on its own theory. Indeed the only issue of state law which the Hawaii Supreme Court found at all substantial was whether the withdrawal of the Wao Kele O' Puna natural area reserve was authorized by state law. *See* Pet. App. 45a. However, that issue is properly resolved by the proposition that "repeals by implication are not favored." *Reefshare, Ltd. v. Nagata*, 70 Haw 93, 97, 762 P.2d 169, 172 (1988). Chapter 195, Haw. Rev. Stat., did not repeal the general discretion to dispose of 5(f) trust lands, conferred elsewhere by Hawaii law, discretion which is contemplated in § 5(f) itself. Indeed, Petitioner's efforts to undo the land exchange would run counter to Pub. L. No. 99-564, which recognized that "[t]he State of Hawaii now holds title to Tract 22 [the lands located near the National Park], having acquired the tract [from Campbell Estate]." H. Rep. No. 99-971, 99th Cong., 2d Sess. (Oct. 7, 1986). Hawaii obviously could not have acquired the Campbell

lands if it did not have authority to exchange the Wao Kele O' Puna reserve. Indeed, Congress's ratification of the exchange quite arguably constitutes a "relax[ation of] the conditions upon which lands had been granted previously [by § 5 of the Admission Act]." *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 632 (1989). In light of this fact, it is not at all likely that this Court could even reach Petitioner's issues. *See* Rule 15.1.

CONCLUSION

For the foregoing reasons, certiorari should be denied.

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Respectfully submitted,

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